IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1918.

No. 258

PUBLIC SERVICE COMPANY OF NORTHERN ILLINOIS,
Appellant,

vs.

STEPHEN B. CORBOY, DRAINAGE COMMISSIONER OF THE CALUMET DITCH,
Appellee.

Appeal from the District Court of the United States for the District of Indiana.

BRIEF AND ARGUMENT FOR APPELLEE.

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(26,119)

SUBJECT INDEX

LIST OF CASES CITED.

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STATEMENT OF CASE.

The drain in question was ordered established and constructed by the Porter Circuit Court of Indiana, and, on due course of appeal, taken by certain railroad companies, this judgment was affirmed by the Supreme Court of Indiana (*Lake Shore, etc., R. Co.* v. *Clough,* 182 Ind., 178), and on writ of error the judgment of the latter court was affirmed by this honorable tribunal. (*Lake Shore, etc., R. Co.* v. *Clough,* 242 U. S., 375.)

The case at bar was a suit brought by appellant in the United States District Court of Indiana to enjoin

the Drainage Commissioner from constructing said drain. He is sued as "Drainage Commissioner for the construction of the Calumet Ditch under the *proceeding* now pending in the Circuit Court of Porter County, entitled," etc. (Rec., p. 1.) The bill avers that

> "under said decree of the Circuit Court of Porter County, entered on March 22, 1911, the defendant, Stephen P. Corboy, was assigned commissioner for the construction of said ditch, and said defendant is now acting as said commissioner and proposes to proceed with the construction and completion of said ditch. No portion of said ditch has yet been constructed. Defendant claims the right to construct said ditch under and by virtue of said *proceeding* instituted under the authority of the Drainage Act above mentioned." (Rec., p. 7.)

While the facts regarding the proposed drain, and the necessity therefor, are brought out with more emphasis by appellee's answer and the special findings of the Porter Circuit Court in the original case, which are made an exhibit to the answer (Rec., pp. 11, 20), yet the bill itself discloses the situation. (Rec., p. 1.) It there appears that the controversy is between the claim of right of appellant, a property owner in Illinois, to such an interest in that portion of the waters of an interstate stream, while flowing in Indiana, that it may insist that the State of Indiana shall desist from the exercise of its police power to rid itself of an extensive marsh within its borders, in favor of appellant, who, at some unfixed date, commenced to use the waters of the stream in Illinois to condense the exhaust steam generated in its plant.

The bill alleges complainant's ownership, at that point to the center of the river, and charges that the diversion of the stream by defendant will reduce its flow and velocity at complainant's plant more than one-half.

The sole purpose of the bill was injunction.

POINTS AND AUTHORITIES.

I.

(a) The attempt to restrain the drainage commissioner is in effect the same as an attempt to restrain the proceedings.

Dietzsch v. *Hinchkoper*, 103 U. S., 494.

French v. *Hay*, 22 Wal., 250.

Western Union Tel. Co. v. *Louisville, etc., R. Co.*, 218 Fed., 628 (C. C. A.).

Union Pac. Co. v. *Flynn* (C. C. A.) 180 Fed., 565.

Rennselaer, etc., R. Co. v. *Bennington, etc., R. Co.*, 18 Fed., 617.

Hyattsville, etc., Co. v. *Bonic*, 44 App. D. C., 408.

(b) The provisions of Section 265 of the Judicial Code extend to the entire proceedings, from the commencement of the suit until the decree is performed.

Sargent v. *Helton*, 115 U. S., 348.

Chapman v. *Brewer*, 114 U. S., 158.

Wayman v. *Southard*, 10 Wheat., 1.

Leathe v. *Thomas*, 97 Fed., 136 (C. C. A.).

Fenwick Hall Co. v. *Old Saybrook*, 66 Fed., 389.

Amusement etc., Co. v. *El Paso, etc., Co.*, 251 Fed., 345.

II.

Section 265 inhibits the granting of an injunction against proceedings in a state court even where the jurisdiction is attacked.

American Assn. v. *Hurst* (C. C. A.), 59 Fed., 1.

Mills, Sheriff v. *Provident, etc., Co.* (C. C. A.), 100 Fed., 344.

Phelps v. *Mutual Reserve Fund Life Assn.*, 112 Fed. 453, confirmed in 190 U. S., 159.

III.

It is not material that the bill seeks to present a constitutional question.

Aultman & Taylor Co. v. *Bramfield* (C. C. A.), 102 Fed., 7, 11.

IV.

The subject-matter was in the possession, actual or constructive, of appellee, as commissioner, who was to all intents and purposes a receiver, and, therefore, the property was in *custodia legis,* and not subject to the writs of other courts.

Wiswall v. *Sampson,* 14 How., 52, 65.

Palmer v. *Texas,* 212 U. S., 118.

V.

The mere fact that a stranger may be prejudiced by the proceeding, the defect not appearing on the face of the record, does not render the judgment void.

VI.

Illinois land owners were not required to be made parties.

(a) In order to give a *locus standi* to a lower riparian proprietor in another state, to complain of the diversion of the waters of an interstate stream, it must appear that there is a concurrence of the laws of the two states in respect to the rights in the stream.

Rickey, etc., Co. v. *Miller,* 218 U. S., 258.
Bean v. *Morris,* 221 U. S., 485.
Rundle v. *Delaware, etc., Co.,* 14 How., 80.
Manville Co. v. *Worcester,* 138 Mass., 89; 52 Am., 261.
Thayer v. *Brooks,* 17 Ohio, 489; 49 Am. Dec., 474.

(b) Riparian questions are state questions, and if the laws of the state do not afford a cause of action, on account of secondary or consequential damage sustained by the diversion of the stream, the lower proprietor is remediless.

Shively v. *Bowlby,* 152 U. S., 1.
St. Anthony Falls, etc., Co. v. *Board,* 168 U. S., 349.

(c) Under the law of Indiana, the lower proprietor cannot recover for a secondary or consequential injury to his riparian rights occasioned by the proper exercise of the police power.

City of Valparaiso v. *Hagen,* 153 Ind., 337.
City of Richmond v. *Test,* 18 Ind. App., 482.

And see:

Barnard v. *Shirley*, 135 Ind., 547.
Taylor v. *Fickas*, 64 Ind., 167.
Cincinnati, etc., R. Co. v. *Connersville*, 170 Ind., 316.

(d) It is the general rule, recognized in Indiana, that riparian proprietors have no property in the water itself.

Atchison v. *Peterson*, 20 Wall., 507.
City of Richmond v. *Test*, 18 Ind. App., 482, and cases.
Angell on Watercourses, Secs. 94 and 95.

(e) Wandering things, like water, oil and gas, are only the subject of a right to reduce the same to possession while on the land, and, therefore, such rights are peculiarly the subject of regulation for the public good.

Ohio Oil Co. v. *Indiana*, 177 U. S., 190.
Townsend v. *State*, 147 Ind., 624.

And see:

Gentile v. *State*, 29 Ind., 409.

(f) A stream, which extends many miles through the territory of an upper state, is affected with a public interest and is peculiarily liable to regulation.

Chicago, etc., R. Co. v. *Grimwood*, 200 U. S., 561.

(g) There being no "taking" of complainant's property, the determination of every other question in the proceeding, since appellant's *res* was beyond

the state line, involved only the exercise of powers of government, concerning which there was no right to be heard.

Paulson v. *City of Portland,* 149 U. S., 30, 40.

Goodrich v. *Detroit,* 184 U. S., 431.

Barber Asphalt Pav. Co. v. *Edgerton,* 125 Ind., 455.

Edwards v. *Cooper,* 168 Ind., 54, 66.

(h) No person has a vested right in any general rule of law or policy of legislation.

Chicago, etc., R. Co. v. *Tranbarger,* 238 U. S., 67.

(i) Acts done by a state, involving the exercise of police powers over non-navigable streams, stand on the same footing, so far as indirect or consequential injury are concerned, as improvements of public rivers by the United States.

Manigault v. *Springs,* 199 U. S., 480.

(j) The state, as a quasi-sovereign, may protect the interests of its people in rivers within its boundaries.

Hudson County Water Co. v. *McCarter,* 209 U. S., 353, 355.

(k) Each state has full jurisdiction over that part of a stream which is within its borders and may determine for itself the rule of law which is to obtain concerning riparian rights.

Kansas v. *Colorado,* 206 U. S., 43, 92.

(l) There being no "taking," the only justicable controversy is one which is not of a private right to wage. The only remedy, if one exists, would be in a suit by the State of Illinois against the State of Indiana in this court, and in such a case the court would apply, as in international controversies, the rule of the greatest good to the greatest number.

Kansas v. *Colorado*, 206 U. S., 46.

(m) An upper state may control a stream within its own boundaries, even where its rights are drawn in question by the lower state, against all claims except those which the court would be prepared "deliberately to maintain against all considerations on the other side."

Missouri v. *Illinois*, 206 U. S., 496, 521.

VII.

The mere charges of the invalidity of the statute, judgment and proceedings amount only to legal conclusions and do not aid the pleading.

Alabama v. *Burr*, 115 U. S., 413.

Central Nat. Bank v. *Connecticut, etc. Co.*, 104 U. S., 54.

St. Louis v. *Knapp*, 104 U. S., 568.

VIII.

Even after the rendition of the decree establishing the drain and ordering the work constructed, the cause continued to pend in the state court, to all intents and purposes as in the case of a receivership, with power on the part of the court not only to enforce the direct provisions of the statute con-

cerning the duties of the commissioner, but with power to meet any situation which might develop in the course of the construction of the drain.

Mak-Saw-Ba Club v. *Coffin,* 169 Ind., 204.
Rogers v. *Voorhees,* 124 Ind., 469.
Murray v. *Gault,* 179 Ind., 658.
Steele v. *Hanna,* 117 Ind., 333.
Karr v. *Board,* 170 Ind., 571.

IX.

The proceeding was not legislative, since it involved the awarding of rights granted by existing laws. If the legislature sees fit to make provision for the determination by a judicial tribunal of the right to the relief provided for by the statute, after an inquiry involving the determination of questions of law and fact, had after the manner of the common law, such proceedings are judicial, and the proceedings constitute a suit in the state court, concerning which the District Court of the United States cannot interfere from the time that the petition is filed until the drain is constructed and the commissioner discharged.

See

Boom Co. v. *Patterson,* 98 U. S., 403.
Union Pac. R. Co. v. *Meyers,* 115 U. S., 2.
County of Upshur v. *Rich,* 135 U. S., 467.
In re The Jarnecke Ditch, 69 Fed., 161.

ARGUMENT.

Case is one of a "proceeding" in state court, even if matter only continued to pend for enforcement of decree.

Appellant's counsel have endeavored to show that at the time the bill was filed herein, there was no judicial proceeding pending in the Porter Circuit Court, apparently overlooking the fact that the effort to enjoin in a Federal Court an officer charged by a state court with the execution of its decree, and subject to contempt for disobedience, is quite as much within the principle of the prohibition found in Section 265 of the Judicial Code (formerly Section 720 of the Statutes) as a direct interference with the court itself. The state court, having entered its decree, would, in the nature of things, be disposed to see to it that its execution, which has been called the fruit of the law, was enforced against outside interference, and as a result there would be likely to ensue a conflict between that court and the officer of a court attempting to break in on the jurisdiction.

The attempt to restrain the drainage commissioner from discharging the duties devolved upon him in respect to the construction of the ditch is, in effect, the same as an attempt to restrain the proceedings.

Dietzsch v. *Hinchkoper*, 103 U. S., 494.
French v. *Hay*, 22 Wal., 250.

Western Union Tel. Co. v. *Louisville, etc., R. Co.*, 218 Fed., 628 (C. C. A.).

Union Pacific Co. v. *Flynn* (C. C. A.), 180 Fed., 565.

Rennselaer, etc., R. Co. v. *Bennington, etc., R. Co.*, 18 Fed., 617.

The provision of Section 265, *supra*, applies to prevent an injunction issuing against proceedings in a state court at any stage of such proceedings, and it extends, not only to the proceedings in a state court up to and including the final judgment, but to the entire proceedings from the commencement of the suit until the decree is performed.

Sargent v. *Helton*, 115 U. S., 348.

Chapman v. *Brewer*, 114 U. S., 158.

Wayman v. *Southard*, 10 Wheat., 1.

Leathe v. *Thomas*, 97 Fed., 136 (C. C. A.).

Fenwick Hall Co. v. *Old Saybrook*, 66 Fed., 389.

Section 265 inhibits the granting of an injunction against proceedings in the state court even where the jurisdiction is attacked.

Dealing with the precise question which counsel raise, by their assertion that the court may enjoin because the complainant was not a party to this proceeding in the Porter Circuit Court, we call attention to the case of *American Assn.* v. *Hurst* (C. C. A.), 59 Fed., 1, wherein suit was brought in the Federal Court to enjoin a sheriff from levying an execution issued out of a state court upon certain real estate, for the reason, as complainant alleged, that it was not a party to the proceeding in the state

court, and that the property about to be sold by the sheriff was in part the property of complainant. The court, speaking by Taft, J. (Lurton and Severens, J. J., concurring), said:

> "The questions necessary for us to consider are—First, whether the sale of land by a sheriff under an execution issued out of the Kentucky court of equity on a sale bond filed therein against the sureties thereon is 'a proceeding' in that court within the meaning of Section 720, Rev. St.; and, second, whether such a sale is 'a proceeding' within the section, even if the land to be sold has been improperly levied upon as the land of a surety in the sale bond and in fact belongs to another person, a stranger to the proceeding. * * * It could hardly be contended that the execution issued on a sale bond, which was given the effect of a judgment by special order of the court, was not a proceeding in that court. Now that by express statute every order of sale impliedly requires the giving of a sale bond, which shall have the effect of a judgment, it is equally clear that the approval of the sale bond makes the execution issued thereon in accordance with the statute a proceeding of the court in which the bond is filed. The claim of counsel that it is a mere ministerial process issuing from the office of the court, without judicial sanction cannot be sustained. * * * But it is said that, even if an execution on a sale bond levied on the property of the obligees is a 'proceeding' of the court in which the bond is filed, an attempt to levy such execution on the property of another, as the property of an obligor in the bond, is void, and as it is not authorized by the execution, and is without the authority of the court, neither the levy nor the sale under it are 'proceedings' of the court within Section 720. * * * The principle is that, in order to preserve the dignity and protect the effective-

ness of the process of courts of concurrent jurisdiction and to avoid unseemly conflicts between them, and between their respective executive officers, no remedy of an injunctive or dispossessory character will be afforded by one court against the acts of the executive officers of the other court, when done under color of an order or process issuing from such other court, because it would have the inconvenient and anomalous effect of staying the proceedings in one court to allow another court to investigate the validity of acts done under such proceedings. A replevin of personal property in the hands of its officer, or an injunction against a levy upon personal property by such officer, will certainly not more offend the dignity of the court, or more interfere with the due discharge of business before it, than will an injunction against a levy on real estate by its officer under color of its process. * * * Of course, in the case of tortious levies upon either personal property or real estate, the person injured may always hold the executive officer liable as a tort feasor for any wrong done in any court having jurisdiction, but comity and public policy require him to apply to the court issuing the process under color of which the wrong is or is about to be done for specific relief by order of injunction or restoration of property. * * * It is clear that the act, however tortious, of an executive officer of a court, done under color of its process, is to be regarded as a 'proceeding' of that court, which comity and public policy require courts of concurrent jurisdiction not to interfere with by injunctive or dispossessory process. *If this be the rule of comity and public policy in the absence of a statute, it is conclusive in determining the true construction of Section 720, Rev. St., and the meaning of the words used therein, 'proceedings in any court of a state.'* That section was passed, not to preserve comity and harmonious action between

courts of the same sovereign exercising concurrent jurisdiction, but to attain such an end, and prevent unseemly conflict between courts of different sovereignties exercising concurrent jurisdiction over the same territory. *The purpose of the statute is so important that a liberal construction should be given to accomplish it.*"

In the case of *Mills, Sheriff*, v. *Provident, etc., Co.* (C. C. A.), 100 Fed., 344, it was sought to enjoin the sheriff of a county from selling land as belonging to a judgment debtor, it being alleged that the land involved belonged to complainant, and that complainant was not a party to the action of the state court in which the judgment was obtained under which the sale was about to be had. The court said:

"It appears from the opinion of the court below that it did not doubt that an execution against property, issued to enforce a money judgment rendered by a state court, is a 'proceeding' within the meaning of that term as used in Section 720 of the Revised Statutes under which every United States court is forbidden, but the court below was of opinion that that section applies only to parties and privies to the action in the state court. * * * *There is nothing in the language of Section 720 of the Revised Statutes, nor in the reason of the enactment, limiting its provisions to parties and privies to the proceeding in the state court, but the prohibition is general, and denies to every federal court the right to stay by injunction, at the suit of any person, proceedings in any court of a state.*"

In the case of *Phelps* v. *Mutual Reserve Fund Life Asso.* (C. C. A.), 112 Fed., 453, affirmed in 190 U. S., 159, the court said:

> *"That the property of a stranger to the proceeding has been taken will not justify a writ of replevin or any other dispossessory or injunctive proceeding, in the court of another jurisdiction, is well settled. Freeman* v. *Howe,* 24 How., 450; 16 L. Ed., 749; *Buck* v. *Colbath,* 3 Wall., 334; 18 L. Ed., 257; and *Covell* v. *Heyman,* 111 U. S., 176."

The case of *Phelps* v. *Mutual Reserve Fund Life Asso., supra,* contains a discussion of the question as to whether a want of jurisdiction in the state court takes the case out of Section 265, *supra,* which is at once so strong and so philosophical that we may be pardoned in quoting from it at length. The opinion was written by Mr. Justice Lurton and concurred in by Mr. Justice Day and also by Justice Severens. It appears from the report of that case in the Circuit Court of Appeals that an action had been brought in a state court of Kentucky against a life insurance company to recover a sum of money. The defendant, having unsuccessfully challenged the service, declined to plead further, and judgment by default was rendered against it. Execution issued on this judgment, and there was a return of *nulla bona.* The court then permitted the plaintiff to file in the original cause what was styled an amended and supplemental petition praying for a receiver, and a receiver was thereupon appointed. The company then filed its bill of complaint in the United States court for an injunction, alleging, among other things, that there was no service upon the so-called amended and supplemental petition, and that the proceeding was without due process of law, and in violation of the 14th Amendment. An injunction

having issued, and a motion to dissolve the same having been overruled, an appeal was prosecuted to the Circuit Court of Appeals. As stated by Mr. Justice Lurton, in rendering the opinion of the latter court, reversing the District Court:

> "The ground upon which the court below proceeded was that there was no such vitality remaining in the primary suit as to justify any kind of supplementary proceeding. To quote the figurative, yet forcible language of Judge Evans, 'the whole so-called supplemental proceeding was an attempt to graft a live branch upon a dead stalk.' For this reason, said the Judge, 'the filing of the supplemental petition and the action of the court in appointing a receiver thereupon will be treated as mere nullities.'"

In considering this question the Circuit Court of Appeals said:

> "There is no pretense of any prior suit in the United States Court, nor of any prior possession, constructive or actual, of the *res* which the receiver was ordered to reduce to possession. The injunction of the state court, forbidding interference with its receiver, is met with a counter injunction forbidding the receiver to proceed with the duties of his appointment, and forbidding his interference with the property of the Mutual Reserve Life Fund Association, which the state court had specifically directed him to take possession and custody of. Which court shall the receiver obey? Unless one court or the other shall yield its pretensions, nothing remains but an appeal to force. * * * If there are principles of comity or of statutory construction by which so deplorable a conflict between coequal courts of concurrent jurisdiction may be avoided, and the operations of our independent systems of judicature rendered

harmonious, it is our highest duty to discover and apply them. * * * It is a rule of almost universal application that, between courts of the same sovereignty and concurrent jurisdiction, the court which first acquires jurisdiction of the controversy or of the *res* should be suffered by every other court to decide every question within the sphere of the pending cause, and to continue in the possession of the subject-matter of the controversy until every question before it shall be decided and the *res* discharged from its control. This rule has its foundation, perhaps, in comity, but the fruits of its recognition have been so beneficent, when applied to courts of concurrent jurisdiction created by different sovereignties, as to justify the conclusion that it is not only a rule of comity, but one of necessity. The cases are numerous which recognize its binding force and illustrate its wide application. No useful purpose will be subserved in making quotations from them. We content ourselves with the citation of a few which are most in point. [Citing cases.] The courts of the state and of the United States are, as to each other, foreign courts. Nevertheless the power sometimes exercised by courts of equity to restrain parties within their jurisdiction from proceeding in a foreign court does not apply to them, and it has long been recognized that state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts. [Citing cases.] Section 720 originated in 1793, and is a legislative command affirmatively enforcing this rule of comity by expressly prohibiting the enjoining of proceedings in state courts, except when authorized in bankrupt cases. Some cases other than bankruptcy suits have been held not to be within the literalism of the statute. Thus it has been held that the statute does not prevent a court of the United States from protecting its own prior jurisdiction over the property in controversy

[citing cases], nor from enforcing its own judgments in causes removed from the state court [citing cases]. So it has been held that, when the requisite federal jurisdiction exists, a bill in equity will lie to deprive parties of the benefits of a decree or judgment obtained by fraud in a state court. [Citing cases.] * * *

"It is plain that in all these cases the federal court was violating no rule of comity, for in every one of the supposed exceptions to the statute the court was either protecting its own prior possession of the *res,* or of the controversy, or enforcing its own judgment. This is true of a suit for the nullification of a judgment upon the ground of fraud. The relief sought in such a case would be the subject of an independent suit in equity, and, if the requisite diversity of citizenship existed, such a suit could be maintained in a Circuit Court of the United States, and any injunction against the enforcement of the judgment nullified for fraud would be mere process for the enforcement of its own judgment, and operative only through its jurisdiction over the parties thereto. * * *

"The effect of the appointment of the appellant as receiver, under the terms of the order, already cited, was to place him constructively in possession of the property of the appellee association within the State of Kentucky. * * * *It is not relevant to say that a void judgment is a nullity, and that whenever it is set up as a justification its voidness may be shown.* The question we have to deal with involves no such question, but concerns the power of a United States Circuit Court, in view of Section 720, to enjoin a proceeding in a state court of concurrent jurisdiction for the purpose of determining whether or not it had exceeded its jurisdiction in respect to the matter complained of. A receiver is peculiarly the hand of the court which appoints him. His possession, whether actual or constructive, is but the possession of the

court, and, when he is dispossessed or enjoined, the court is dispossessed or enjoined. Can it need anything more than the plain unmistakable language of the statute to perceive that such a case is within both its letter and spirit? Is it enough to take a given case out of the statute that the complainant, asking an injunction against action under an order, a writ, or process from a state court, challenges the power of the court to make the order or issue the writ complained of?"

The court then proceeds to consider at length this aspect of the question, and concludes as follows:

"No case has been called to our attention which sanctions the contention of counsel that the mere fact that the jurisdiction of the state court is challenged will justify the enjoining of one court by another. The state and Federal courts are independent of each other, except in a limited class of cases, when a writ of error will lie from the highest court of a state to the Supreme Court of the United States. They are courts of equal dignity and of concurrent jurisdiction in respect to the subject-matter of this controversy. Neither court has the power to control or coerce the other. If the Circuit Court of the United States has the power and jurisdiction, when diversity of citizenship exists, to enjoin and dispossess a receiver, acting under authority of the Jefferson Circuit Court, upon a bill averring a defect of jurisdiction, the other must have an equal right upon a case arising presenting similar jurisdictional questions. The power must be reciprocal, if it exists. We entirely approve the view expressed by District Judge Love in *Senior* v. *Pierce* (C. C.), 31 Fed., 625, 631, in saying that:

'Inasmuch as the very purpose of non-interference is to prevent a conflict between the two jurisdictions, I can see no difference in the

application of the principle whether the question to be decided by the two courts is one of jurisdiction, or of mere property right, the jurisdiction being conceded. The state court must needs decide for itself whether or not the seizure proceeding was illegal. There is no other tribunal with competent authority to decide this question for the state court. If the Federal Court may decide the question of the regularity of the seizure and jurisdiction adversely to the state court, and proceed to take the property from its custody by force, why may not the state court reciprocally, in any parallel case, decide the same questions when property is in our custody, and proceed by a writ of replevin to dispossess the marshal? But, assuredly, if the Federal Court were in possession by legal process, it would not permit the state court to decide the question of jurisdiction and wrest the property from our control.' "

Not material that bill seeks to present a constitutional question.

Upon this question also Mr. Justice Lurton has spoken. In *Aultman & Taylor Co.* v. *Bramfield* (C. C. A.), 102 Fed., 7, 11, he said, in pronouncing the opinion of the court:

"But it is said that the complainant has been subjected to the deprivation of certain rights secured by the Constitution for the protection of their property * * * and that the proceeding by which this *prima facie* evidence of liability has been constructed was a proceeding in which the requirement of due process of law was not observed, and that this bill is an action in which complainant invokes the protection of the courts of the United States against the deprivation of the rights guaranteed to it by the 14th Amendment of the Constitution. But if it is plain that no efficient relief can be granted to

the complainant under such a bill unless the court can stop the proceeding in the state court, and draw to itself original jurisdiction to hear and determine the issues presented by the bill, we are still confronted with the positive provisions of Section 720 forbidding an injunction against a proceeding in a state court."

Subject-matter of the proceeding was in custodia legis.

The Indiana Supreme Court has declared that a drainage commissioner occupies a position analogous to that of a receiver, and the analogy is perfect. Nothing can be clearer than the proposition that in such a case a third person cannot break in, through the medium of a collateral suit, on the possession of the court, through its officer. In *Wiswall* v. *Sampson*, 14 How., 52, 65, this court said:

"When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel* v. *Smith*, 9 Ves., 335, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo*. (1 J. & W., 176, *Brooks* v. *Greathed;* 3 Daniel's Pr., 1984.) And the doctrine that a receiver is not to be disturbed, extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined *pro interesse suo;* and this, though their

> right to the possession is clear. (1 Cox, 422; 6 Ves., 287.) * * * This proceeding was explained by Lord Eldon in *Angel* v. *Smith,* 9 Ves., 335, speaking of the rule in respect to sequestrators, and which he held was equally applicable in the case of receivers. 'Where sequestrators,' he observed, 'are in possession under the process of the court, their possession is not to be disturbed, even by an adverse title, without leave; upon this principle, that the possession of the sequestrators is the possession of the court, and the court being competent to examine the title, will not permit itself to be made a suitor in a court of law, but will itself examine the title. And the mode is, by permitting the party to come in to be examined *pro interesse suo;* the practice being, to go before the master to state his title, and there is the judgment of the master, and afterwards, if necessary, of the court upon it.' (See, also, 10 Beav., 318; 2 Daniel's Pr., 1271; 2 Madd., 21; 1 P. Wms., 308.)"

The proposition that a receiver or other officer having custody of property on behalf of a state court is not to be disturbed by a writ of injunction from a Federal Court, does not rest alone upon Section 720, but upon the fundamental doctrine that property *in custodia legis* is not subject to the writs of other courts. Actual possession is not necessary.

Palmer v. *Texas,* 212 U. S., 118.

The decree was not void.

In any event the decree of the Porter Circuit Court is not to be treated as a mere *brutum fulmen,* the law under which it was entered being valid and a lack of jurisdiction not appearing on the face of the proceedings. The decree would not be void, even as against a stranger, and much less is it to be

treated as a nullity for the purposes of Section 265 of the Judicial Code, on the mere allegation of a stranger that he is prejudiced by it. As the maxim runs "Matters adjudicated in a cause do not prejudice those who are not strangers to it," but this does not mean that in all cases the stranger may go into any forum to attack the judgment. The proceeding was certainly sufficient to carry the *res* into the jurisdiction of the state court, and while that court, by its commissioner, has constructive possession of the *res*, the whole subject-matter is under the control of that court.

Illinois land owners were not required to be made parties.

In order to give a *locus standi* to a lower riparian proprietor, whose lands are in another state, to complain of the diversion of the waters of an inter-state stream, it must appear that there is a concurrence of the laws of the two states in respect to rights in the stream.

Rickey etc. Co. v. *Miller,* 218 U. S., 258.
Bean v. *Morris,* 221 U. S., 485
Rundle v. *Delaware etc. Co.,* 14 How., 80.
Manville Co. v. *Worcester,* 138 Mass., 89; 52 Am., 261.
Thayer v. *Brooks,* 17 Ohio, 489; 49 Am. Dec., 474.

Riparian questions, after the title has passed out of the United States, are state questions. *Shively* v. *Bowlby,* 152 U. S., 1; *St. Anthony Falls, etc., Co.* v. *Board,* 168 U. S., 349.

Based on the proposition that each state may for itself determine the rule of law in respect to riparian rights, it was held in the case last cited that no Federal objection existed to a holding by the state court that a city might appropriate the waters of a lake for public purposes, by virtue of legislative authority, without making compensation to mill owners who were dependent for power upon a stream which was fed by such lake.

Under the law of Indiana the lower proprietor cannot successfully complain of a secondary or consequential injury to his riparian rights occasioned by the proper exercise of the police power.

City of Valparaiso v. *Hagen,* 153 Ind., 337.
City of Richmond v. *Test,* 18 Ind. App., 482.

And see:

Barnard v. *Shirley,* 135 Ind., 547.
Taylor v. *Fickas,* 64 Ind., 167.
Cincinnati, etc., R. Co. v. *Connersville,* 170 Ind., 316.

It is the general rule, recognized in Indiana, that riparian proprietors have no property in the water itself.

Atchison v. *Peterson,* 20 Wall., 507.
City of Richmond v. *Test,* 18 Ind. App., 482, and cases.
Angell on Watercourses, Secs., 94 and 95.

Wandering things, like water, oil and gas, are not, strictly speaking, subjects of property, but are only the subject of a right to reduce the same to possession while on the land, and therefore such rights are peculiarly the subject of regulation, for the public good.

Ohio Oil Co. v. *Indiana,* 177 U. S., 190.
Townsend v. *State,* 147 Ind., 624.

And see:

Gentile v. *State,* 29 Ind., 409.

Here, apart from general principles of law, the Legislature has provided in the Drainage Act that the method of drainage may be "by diverting such water course from its channel, by deepening, widening or changing the channel of such water course." Sec. 3, Drainage Act.

An easement in a stream which extends many miles through the territory of an upper state is "affected with a public interest; it ceases to be *juris privati* only," and therefore such a right is peculiarly liable to regulation in the public interest.

Nothing is more clear than that in the construction of the drain in question, there is nothing more than a secondary or consequential injury occasioned by the proper exercise of the police power. Neither under the Fourteenth Amendment to the Constitution of the United States nor under the Constitution of Indiana is there any "taking."

There being no taking of complainant's property, and no injury thereto for which damages would have to be awarded, and no effort to charge the property with special benefits, there was no occasion to make complainant a party or to give notice to it, for the determination of every other question in the proceeding involved only the exercise of powers of government concerning which there was no right to be heard.

Paulsen v. *City of Portland*, 149 U. S., 30, 40.

Goodrich v. *Detroit*, 184 U. S., 431.

Barber Asphalt Pav. Co. v. *Edgerton*, 125 Ind., 455.

Edwards v. *Cooper*, 168 Ind., 54, 66.

"No person has a vested right in any general rule of law or policy of Legislature entitling him to insist that it shall remain unchanged for his benefit."

Chicago, etc. R. Co. v. *Tranbarger*, 238 U. S., 67.

Acts done by a state, involving the exercise of its police power over non-navigable streams, stand on the same footing, so far as complaints on account of indirect and consequential injury are concerned, as improvements of public rivers by the United States.

Manigault v. *Springs,* 199 U. S., 480.

The state, as a quasi-sovereign and representative of the interests of the public, may protect the interests of its people, "in the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." The "public interest is omnipresent whenever there is a state, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots."

Hudson County Water Co. v. *McCarter,* 209 U. S., 353, 355.

Each state has full jurisdiction over that part of a stream which is within its borders, and may determine for itself the rule of law which is to obtain concerning riparian rights.

Kansas v. *Colorado,* 206 U. S., 43, 92.

As against the exertion of the police power of the state to improve its property or abate a nuisance, by modifying or changing the flow of an interstate stream within its boundaries, the riparian rights of proprietors in the lower state, who are damaged by the changing of the stream, must give way. The only justicable controversy which can exist in

such a case is one which is not of private right to wage. The laws of the state wherein the diversion occurs not giving a right of action, the only remedy is in a suit by the lower state against the upper state in this court, and in such a case the court will apply, as in international controversies, the rule of the greatest good to the greatest number.

Kansas v. *Colorado,* 206 U. S., 46.

Even in a controversy between states over an interstate stream, the principle is recognized of the right of the upper state to control the stream within its own boundaries, in opposition to all claims except those which the court would be prepared "deliberately to maintain against all considerations on the other side."

Missouri v. *Illinois,* 206 U. S., 496, 521.

Complainant's bill, in addition to specifically charging that the Drainage Act deprives it of its property without due process of law, charges generally that said act is in violation of the Fourteenth Amendment. This would seem to be an admission that the statute as framed is of such character as to be designed to deny complainant the right to complain, but we pause to point out, if it be claimed that the equal protection of the law be denied, that the language of the Amendment on that subject is that the state shall not "deny to any person *within its jurisdiction* the equal protection of the law." This provision was evidently carefully framed so as not to impair the rights of the state as a quasi-sovereign.

The power of Indiana necessarily ceases at its

own boundaries; it can neither provide for a judgment which will award damages in favor of, nor assess benefits against, a *res* in another state, and appellant, being unable to point out wherein the state has violated the fundamental social compact, stands in the attitude of challenging the exertion of the powers of a government which is sovereign, so far as appellant is concerned.

Beyond the allegation that appellant was not a party, certain general charges are made as to the invalidity of the statute, judgment and proceeding, but these amount only to legal conclusions and do not aid the pleading.

Alabama v. *Burr*, 115 U. S., 413.
Central Nat. Bank v. *Connecticut, etc., Co.*, 104 U. S., 54.
St. Louis v. *Knapp*, 104 U. S., 568.

Status of proceeding after entry of decree establishing the drain and ordering it constructed.

While it will be observed that the Legislature, for a very practical reason, has authorized an appeal to be taken from the decree establishing the drain and ordering the work constructed, yet, the effect of an appeal is only to suspend the work, and after the appeal is disposed of, assuming that the decree still stands, the court then proceeds, through its commissioner, to execute its prior order. While, as indicated, there may be a period of suspension, yet, aside from the element of time interruption, the proceeding is a judicial proceeding in a court.

In *Mak-Saw-Ba Club* v. *Coffin*, 169 Ind., 204, the court said:

"In getting at the *status* of this proceeding at the time in question [during construction], attention should be given to *Perkins* v. *Haywood,* 124 Ind., 445. It was there pointed out that so far as establishing the work as a public drain is concerned, the order upon that subject constitutes the final judgment and that thereafter the cause is upon the docket for the purpose of carrying out the provisions of that judgment. We may, therefore, infer that from the time the construction commissioner is appointed until he is discharged, *his relation to the court is in the nature of a trusteeship.*"

We have had a number of cases decided in Indiana which go to show that at this stage of the proceedings the court may be called on, as an incident of the principal power to establish and order constructed, to perform many acts which are clearly of a judicial character.

In *Rogers* v. *Voorhees,* 124 Ind., 469, it was held that upon petition and notice the court might make additional assessments for the purpose of completing the construction of the drain. Judge Mitchell, speaking for the court, said:

"The drainage of the land cannot be deemed fully accomplished, *nor the proceeding ended, until the drain has been completed* according to the plans and specifications on file, and the expenses of constructing the work, and the costs and damages necessarily incident thereto, have been paid, and until the commissioner, having charge of the work has made his final report, and an order discharging him has been made by the court. *Until this is done the proceeding remains under the control of the court.* An attentive reading of the act referred to, keeping in view the scope and purpose of the statute, and that it is to be liberally construed so as to

promote the end for which it was enacted, makes it manifest that while the proceeding remains under its control the court has large discretion in respect to modifying, equalizing and changing assessments."

A like holding was made in the case of *Murray* v. *Gault*, 179 Ind., 658.

In *Steele* v. *Hanna*, 117 Ind., 333, the court, in holding that after the drain had been ordered established, the lower court had power to correct a mistake in the description of the land affected by the drain, said:

> "The commissioner having charge of the work is, by the express terms of the statute, under the direction and control of the court until the work is finally completed and a final report of the receipts and expenditures made. Section 4279, R. S. 1881. * * * *These provisions are persuasive of the fact that the proceedings, like those in cases of the administration of decedents' estates, and receiverships and the like, remain under the control of the court until the work is finally completed, and the final report of the commissioner approved.* * * * It is an inherent power of a court, while the proceeding remains under its control, to cause its record, or to cause or permit any process, return or report, to be amended, or modified."

In the case of *Wabash R. Co.* v. *Todd*, 186 Ind., 72; 113 N. E., 997, the facts were that after the drain had been ordered established by the Circuit Court, the construction superintendent filed his supplemental application for an order requiring the railroad company to comply with the judgment of the court in respect to opening up its right-of-way to

permit the drain to pass. On such supplemental application the company appeared and the court granted the order. On appeal by the company it was contended by it that "appellee, as superintendent for the construction of the drainage improvement, has no authority under the law to maintain this action, either individually or as a relator, and that the trial court had no jurisdiction of the subject-matter of the alleged action." In affirming the judgment the court said:

> "The judgment which established the drain and ordered its construction was final in character and terminated the adversary proceedings, but *the action thereafter remained on the court docket for the purpose of carrying such judgment into effect.* * * * *As superintendent for the construction of an improvement, established by order of the Wabash Circuit Court, in which the proceeding was still pending, he was acting as an officer of that court, and was charged with the duty, not only of making such reports to the court as should show the condition of the work as it progressed, but also of asking such further orders and instructions as should prove necessary for its proper completion.* This duty exists independent of statutory provision, but, impliedly at least, it is within the contemplation of Section 6144, Burns 1914, which directs the work of the construction superintendent."

In *Indianapolis, etc., R. Co.* v. *State,* 105 Ind., 37, it was held that where the commissioner was proceeding contrary to the method prescribed, a direct application might be made to the court.

In the case of *Karr* v. *Board,* 170 Ind., 571, 582, it is said:

"Section seven of the act of 1885, concerning drainage (Acts 1885, p. 129, sec. 5628, Burns 1894), provides that the drainage commissioner shall at all times be under the control and direction of the court, and shall obey its directions, and this undoubtedly includes, since the section refers to 'all times,' the orders of the judge in vacation. See, also, Section seven of the act of 1907 (Acts 1907, p. 508, Sec. 6147, Burns 1908); *Michigan Cent. R. Co.* v. *Northern Ind. R. Co.* (1851), 3 Ind., 239; *Pressley* v. *Lamb* (1886), 105 Ind., 171. It may further be said that both *the commissioner and the contractor are agencies or arms of the court, and it is a necessary incident of the authority to construct drains that both shall be under the jurisdiction, and subject to contempt for a disobedience, of the ad interim orders of the court or of the judge thereof in vacation.*"

The language just quoted is a part of the reasoning of the court in the course of an opinion holding that a property owner in Putnam County, who had not been made a party to a drainage proceeding, established by the judgment of the Morgan Circuit Court, could not enjoin the drainage commissioner and contractor, by suit in the Putnam Circuit Court. Continuing, the Supreme Court indulged in the following observations, which show very clearly the court's view that even at the stage indicated the matter still constituted a proceeding over which the Morgan Circuit Court possessed a jurisdiction which, on ordinary principles, should not be interfered with:

"It is against the policy of the law to permit a situation to arise wherein there may be an unseemly conflict of jurisdiction between courts of equal rank in the determination of the ques-

tion as to the extent or proper exercise of the authority of the court which first assumed jurisdiction over the subject-matter (*Scott* v. *Runner* (1896), 146 Ind., 12; 58 Am. St., 345), and, besides, it is inequitable that in a drainage proceeding, wherein jurisdiction may be extended over all persons by supplemental petition (Sec. 5629, Burns 1901, Acts 1885, p. 129, Sec. 8; Sec. 6148 Burns 1908, Acts 1907, p. 508, Sec. 8; *Osborn* v. *Maxinkuckee, etc., Co.* (1900), 154 Ind., 101), a landowner should be permitted to arrest the proceedings by injunction in another court, while refusing to submit himself to the jurisdiction of the court which not only has authority over the construction of the drain, but which has power to make all orders which are meet in the premises."

The case last cited very clearly shows that it is the view in Indiana that during the construction of the drain, the court still continues to act judicially; that the office of commissioner is to all intents and purposes that of a receiver, or, in other words, he is an arm of the court, and that the court has such a jurisdiction over the proceeding at that stage that it would naturally be disposed to protect its officer against what it conceived to be unwarranted acts of interference by the ministerial officers of other courts. In this case, therefore, we do not merely stick in the bark on the literalism of Section 265, but we confidently rely on being protected by the principle of that statute.

The claim that an injunction was sought against a "legislative, executive or administrative act."

It was doubtless possible, in the exercise of the powers of the state government, to have provided for the construction of drains by proceedings which were not, in a strict sense, judicial, but that is not the character of the Act of 1907.

It cannot be said that this proceeding was legislative, for it involved the awarding to the petitioners of their rights under existing laws; nor can it be said to be executive or administrative, although the hearing might have been provided for before a mere board, but in its actual setting it involves a proceeding before a tribunal, in its general character a court, which proceeds, on the acquisition of jurisdiction, to the determination of questions of both law and fact, and which, as the result of the hearing, renders a judgment or decree. This involves a complete conception of a judicial proceeding.

Under that portion of the Drainage Act of 1907, relative to drains ordered and constructed by proceedings in court, we find that remonstrances are filed in open court, issues of both law and fact are formed and determined, changes are provided for from the Judge, findings of fact, either general or special, are made, and judgment is entered thereon, with right to motion for a new trial, and an appeal is authorized to the Supreme Court. In addition, it has been held that the Civil Code of Procedure may be looked to to supply the silences of the Drainage Act, in matters of practice. *Hart* v. *Scott,* 168 Ind., 530.

That the original proceeding was judicial in character does not admit of dispute, and being judicial proceeding in its inception, it remains such until the judgment is executed by the officer or arm of the court, appointed by and acting under its control for that purpose.

In stating that the "final act" is the "construction of the ditch," counsel state the proposition too narrowly; the final act is the determination by a court, having jurisdiction of the parties, after passing on all relevant questions of law and fact, whether the petitioners are entitled to the relief the law awards to them, and, if so, giving judgment in their favor.

It must not be forgotten that we are dealing with a statute which inhibits the use of the writ of injunction in the Federal Court "to stay proceedings in any court of the state," and, while it may be entirely proper not to extend this statute to a legislative proceeding, which may possibly be entertained in a court under the framework of some state governments, and while it is clear that mere executive or administrative proceedings are not protected by the statute, yet what reason can be found, either in the letter of the statute or in the spirit which gives life to it, for holding that a proceeding, although it involves a statutory remedy, had before a court, on the acquisition of jurisdiction over the parties, involving the determination of rights given by law, after the settlement of issues of fact and law, is not a proceeding in a state court?

Put into a court the jurisdiction to determine that a drain be established, as a matter of right under existing law, after the acquisition of jurisdiction

and a hearing had, after the manner of the common law, and there is nothing left to argue concerning the application of the statute, where such proceedings are sought to be enjoined. In principle, we think that some of the cases under the removal statute pre-judge appellant's contention.

In *Boom Co.* v. *Patterson,* 98 U. S., 403, this court held that while the right of eminent domain was a sovereign right, and therefore the proceeding before the commissioners was in the nature of an inquest, yet "when it was transferred to the District Court by appeal from the award, it took, under the statute of the state, the form of a suit at law, and was, therefore, subject to its ordinary rules and incidents." On this ground it was decided that the cause was removable.

To the same effect is *Union Pac. R. Co.* v. *Meyers,* 115 U. S., 2.

In *County of Upshur* v. *Rich,* 135 U. S., 467, it was held that while a proceeding by administrative officers, looking to the valuation of property for the purposes of taxation, was not a suit, and did not become such on appeal to a board of assessors or commissioners having no judicial power, yet, it did become a suit on a further appeal to a court having jurisdiction to determine questions of law and fact.

In the case of *In re The Jarnecke Ditch,* 69 Fed., 161, which involved a proceeding under the Indiana Drainage Act of 1885, which, as to procedure, was practically a counterpart of the act of 1907, it was held, in a carefully prepared opinion by Baker, J., that the proceeding involved the determination of such issues in court as to "present a controversy in the state court in the nature of a civil suit."

Other cases cited by appellant's counsel are not in point.

The case of *Simon* v. *Southern R. Co.*, 236 U. S., 115, involved no more than the granting of a Federal injunction against a party who was seeking to make use of a fraudulent judgment. The facts made out a case for the maintaining of a suit on independent grounds of equity jurisdiction, and the opinion contains a strong statement of the operation of Section 265.

In *Hunt* v. *New York Cotton Exchange*, 205 U. S., 322, the state injunction, granted at the suit of Hunt, restrained a *telegraph company* from discontinuing the *furnishing* of quotations. The *Exchange* then filed a bill to enjoin Hunt from "*receiving*" quotations. The court properly held that the parties and the purposes of the suits were different. Here, as opposite counsel show, the commissioner is a representative party, the officer of the court engaged in the doing of the very act which appellant would enjoin him from doing. A case more plainly within the prohibition of the statute could not be conceived of. No reason existing in the *Hunt* case for not enjoining *Hunt* at the suit of a third party, from *receiving* a service he had no right to, as against such third party, merely because he had obtained an injunction in the state court forbidding some one else from *discontinuing the furnishing* of the service to him.

The case of *Madison Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S., 239, involved merely the power of the Federal Court, after proper steps had

been taken to remove the cause, thus giving the Federal Court jurisdiction, to protect that jurisdiction, by enjoining the plaintiff from further proceeding in the state court. Here the court below could not obtain jurisdiction in the first instance to do what was the sole purpose of the bill, to enjoin proceedings in a state court.

We submit that the judgment of the District Court should be affirmed.

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